

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON CRAIG SHEPHERD,

Defendant-Appellant.

UNPUBLISHED

March 18, 2003

No. 235101

Oakland Circuit Court

LC No. 00-172706-FC

Before: Markey, P.J., and White and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for voluntary manslaughter, MCL 750.321.¹ Defendant was sentenced to four years to fifteen years' imprisonment. We affirm.

I. Facts

Witnesses testified that there was an altercation between defendant and a group of young men who were playing roller hockey at the Shopping Center Market parking lot in West Bloomfield just prior to midnight on May 8, 2000. Defendant was a night stock clerk for the Shopping Center Market. During the roller hockey game, the ball went toward the street and one of the men went to retrieve the ball. While retrieving the ball, the man was nearly hit by defendant, who was in his vehicle pulling into the parking lot. Defendant then nearly hit two other hockey players with his vehicle. Later, during the game, the ball rolled under defendant's parked vehicle. Defendant was sitting in his car, with the driver's window cracked open. One of the men playing hockey went to retrieve the ball and asked defendant whether he realized that he had almost hit three men with his vehicle. At this point a fight ensued between defendant and some of the hockey players. After the fight broke up, defendant got in his vehicle and began chasing the hockey players with his vehicle. After hitting and injuring one man with his vehicle, defendant circled the parking lot and started driving towards the victim. The victim, who had been at the parking lot watching his brother play hockey and who was not in any way involved in the fight started to scream and was then hit by defendant's vehicle. The victim was pronounced dead as a result of a blunt force causing cerebral trauma and complications.

¹ Defendant was originally charged with second-degree murder, MCL 750.317.

II. Analysis

A. Directed Verdict

Defendant first asserts that the trial court erred in denying his motion for a directed verdict, and argues that the evidence was insufficient for a reasonable finding of malice. We disagree. This Court reviews motions for a directed verdict de novo. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). When reviewing a motion for a directed verdict, this Court views the evidence presented up to the time the motion was made in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Crawford*, 232 Mich App 608, 615-616; 591 NW2d 669 (1998).

Second-degree murder is a general intent, not a specific intent, crime. *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). To prove a defendant guilty of second-degree murder, the prosecution must show “(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.” *People v Aldrich*, 246 Mich App 101, 123; 631 NW2d 67 (2001). Malice is defined as “the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.” *Goecke, supra* at 464. Malice may be inferred from evidence that the defendant “intentionally set in motion a force likely to cause death or great bodily harm.” *Aldrich, supra* at 123, quoting *People v Djordjevic*, 230 Mich App 459, 462; 584 NW2d 610 (1998).

The prosecution presented sufficient evidence that defendant intentionally set in motion a force likely to cause death or great bodily harm. The prosecution presented evidence through multiple witnesses indicating that defendant steered his vehicle toward several of the men who were part of the roller hockey game, and then made several laps in the parking lot and returned to chase the men with his car. The evidence showed that defendant struck one person with his vehicle, injuring that person’s leg. Defendant then circled the parking lot at least once before driving straight toward the victim, striking the victim with his vehicle. The prosecution also presented the detailed findings of the accident reconstructionist, whose analysis of the acceleration mark near the place where the victim was hit indicated that defendant accelerated his vehicle as he drove straight into the victim. The accident reconstructionist also confirmed that defendant did complete at least eleven different circles or laps in the parking lot with his vehicle. Thus, when viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to find beyond a reasonable doubt, defendant’s “intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.” *Goecke, supra* at 464. Therefore, the trial court properly denied defendant’s motion for a directed verdict.

Furthermore, we find unpersuasive defendant’s argument that the Michigan Supreme Court’s decision in *People v Graves*, 458 Mich 476; 581 NW2d 229 (1998), warrants reversal because the higher, unwarranted second-degree murder charge contributed to the jury’s verdict. The *Graves* decision deals with situations where there is insufficient evidence presented to support a charge, and consequently, error occurs in the form of a compromise verdict after submitting the unwarranted charge to a jury. *Graves, supra* at 487-488. In the present case,

there was sufficient evidence to submit the charge of second-degree murder to the jury, although defendant was only convicted of voluntary manslaughter.

B. Jury Instructions

Defendant next contends that he is entitled to a new trial because the trial court improperly instructed the jury with the definition of specific intent.² We disagree. This Court reviews jury instructions as a whole to determine whether there is error requiring reversal. *Aldrich, supra* at 124. Somewhat imperfect instructions do not create error if they fairly present to the jury the issues tried and sufficiently protect the defendant's rights. *Id.* The jury instructions must include all the elements of the charged offense and must not omit material issues, defenses, and theories if there is evidence to support them. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). As long as the instructions fairly and accurately present the issues to the jury and sufficiently protect the defendant's rights, slight imperfections do not constitute error requiring reversal. *Id.* at 143-144. The appellant bears the burden of showing that as a result of the alleged error, when weighed against the facts and circumstances of the entire case, it affirmatively appears more probable than not that the error was outcome determinative. MCL 769.26; *People v Rodriguez*, 463 Mich 466, 473-474; 620 NW2d 13 (2000).

During deliberations, the jury inquired as to whether intent is necessary "for second-degree or voluntary manslaughter as an intent to commit the crime." The trial court explained that there were two types of intent, and read to the jury the definition of specific intent. Defendant argues that the trial court should not have read the definition of specific intent, but instead, the trial court should have merely re-read the entire jury instructions. "A court must properly instruct the jury so that it may correctly and intelligently decide the case." *People v Clark*, 453 Mich 572, 583; 556 NW2d 820 (1996). "Where confusion is expressed by a juror, it is incumbent upon the court to guide the jury by providing a 'lucid statement of the relevant legal criteria.'" *People v Martin*, 392 Mich 553, 558; 221 NW2d 336 (1974), overruled in part on other grounds, *People v Woods*, 416 Mich 581; 331 NW2d 707 (1982).

The jury instructions, as a whole fairly presented the issues, set out the elements of the crime, and protected defendant's rights. The trial court was careful to inform the jury that specific intent was not part of the jury's determination, and that it was offered only to provide a distinction between specific intent and general intent. Moreover, defendant cannot complain concerning an error in a jury instruction, which required more proof from the prosecutor than is necessary as a matter of law. *People v Wesley*, 421 Mich 375, 393 n 6; 365 NW2d 692 (1984).

² Defendant also argues that the trial court should not have explained to the jury the elements of second-degree murder or the manner in which the jury deliberations should proceed. However, defendant has waived these claims of jury instruction errors. With the exception of the specific intent instruction, defendant expressly acquiesced to all other jury instructions as given; therefore, defendant has waived any error on appeal. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). It is well established that one who waives his rights before the trial court may not then raise it as an error on appeal, for his waiver has extinguished any error. *Id.* Therefore, we do not address defendant's other claims of instructional error.

Therefore, the fact that the trial court may have improperly read the specific intent instruction was harmless, because it placed a higher burden on the prosecution than was necessary by law.

Additionally, defendant does not explain how the trial court's response was confusing to the jury or how a re-reading of the entire jury instructions would have been outcome determinative. Imperfect instructions that do not prejudice a defendant do not require reversal. *People v Carines*, 460 Mich 750, 772; 597 NW2d 130 (1999). There is nothing in the record to suggest that, following the trial court's response, the jury continued to be confused over the intent element or that it was unable to follow the trial court's instructions. The trial court carefully addressed the jury's concern, and accurately provided the relevant law. The jury instructions, and the manner in which the trial court responded to the jury's questions during deliberation, considered as a whole, accurately apprised the jury of the elements of the second-degree murder charge and the lesser-included offenses of voluntary and involuntary manslaughter, and negligence homicide, and sufficiently protected defendant's rights. There is nothing from the record indicating that the jury's confusion was not properly cured by the trial court's instructions. Therefore, even assuming an error had been made when the trial court read to the jury the specific intent instruction, there is nothing to show that the error was outcome determinative.³

C. Exclusion of Evidence

Defendant asserts that the trial court abused its discretion when it excluded evidence of the brutal attack on him by the group of men after he had returned to the scene of the accident. We disagree. This Court reviews for an abuse of discretion the trial court's decision to exclude evidence that is substantially more prejudicial than probative pursuant to MRE 403; *People v Figgures*, 451 Mich 390, 398-399; 547 NW2d 673 (1996). "An abuse of discretion exists when 'an unprejudiced person,' considering 'the facts upon which the trial court acted, [would] say that there was no justification or excuse for the ruling made.'" *People v Hendrickson*, 459 Mich 229, 235; 586 NW2d 906 (1998).

Upon reviewing the record, we conclude that the trial court was justified in concluding that the evidence was irrelevant because the two events were unrelated. Further, the evidence may have created a confusion of the issue in this case, which was whether defendant had the requisite intent to meet the criteria for second-degree murder *at the time* he struck the victim, and not afterwards. Accordingly, the trial court did not abuse its discretion in excluding the evidence.

III. Conclusion

³ Additionally, we find unpersuasive defendant's argument that he was wrongly convicted because the evidence in the case did not support a conviction for second-degree murder or voluntary manslaughter. Defendant, relying on *Victor v Nebraska*, 511 US 1, 6; 114 S Ct 1239; 127 L Ed 2d 583 (1994), alleges that absent the erroneous instructions, in light of the considerable evidence that the victim's death was accidental, the jury would have found him guilty of involuntary manslaughter or negligent homicide. However, as previously discussed in this opinion, the evidence was sufficient to sustain defendant's conviction.

In sum, the trial court properly denied defendant's motion for a directed verdict. Further, even if the trial court erred when it read to the jury the specific intent instruction, there was no evidence presented that the error was outcome determinative. Last, the trial court did not abuse its discretion when it excluded evidence of an attack on defendant after he returned to the scene of the accident.

Affirmed.

/s/ Jane E. Markey
/s/ Helene N. White
/s/ Brian K. Zahra